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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ALBERT PAEZ et al., Defendants and Appellants.	D058373 (Super. Ct. No. INF062219)

APPEALS from judgments of the Superior Court of Riverside County, Richard A. Erwood, Judge. Judgment affirmed as to Flores; judgment affirmed as modified as to Paez.

A jury convicted Anthony Albert Paez and Edgar Antonio Flores (defendants) of the provocative act murder of fellow gang member, Alexis Melendrez, arising out of a gun battle with police. The jury also convicted defendants of other crimes arising out of this incident, and Paez of crimes arising out of a similar, earlier, incident.

Flores appeals, contending the trial court erred in denying his motions to: (1) sever the charges against him from the charges against Paez; and (2) bifurcate the gang enhancement allegations from the trial on the substantive counts. He also asserts that substantial evidence does not support his convictions for second degree provocative act murder and receiving stolen property, and the true finding on the gang enhancement connected to his murder conviction. We reject his arguments.

Paez appeals, contending the trial court: (1) improperly instructed the jury on attempted murder; and (2) was required to stay his sentences for street terrorism (Pen. Code, § 186.22, subd. (a)) under Penal Code section 654. (Undesignated statutory references are to the Penal Code.) We reject his first contention, but agree with his second.

Paez also asserts, the Attorney General concedes, and we agree, that his abstract of judgment and minute order incorrectly state his sentence on count 12 for attempted murder as 15 years to life, and that the abstract of judgment and minute order must be amended to correctly reflect his sentence on count 12 as life with the possibility of parole after a minimum term of seven years, plus 20 years for the firearm enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

May 23 Shooting

On the evening of May 23, 2008, California Highway Patrol (CHP) Officer Eric Pena was patrolling Desert Hot Springs in a marked car with his partner when he observed a Toyota Camry make an aggressive turn and then run a stop sign. (All further dates are in 2008.) As the officers tried to pull over the Camry, Paez popped out of the

passenger side window firing a shotgun. The officers reduced their speed and lost sight of the Camry as it sped up to 90 miles per hour in a residential area.

May 30 Shooting

On the evening of May 29, Robert Edward Ray was at a gas station in Desert Hot Springs with his Honda Accord when he saw Paez and agreed to give him a ride to a house where they picked up a man and a woman. Ray later stopped the car to urinate. While he was gone, someone inside the car took it without his permission. Ray had his sister pick him up and then reported the crime.

The following evening, CHP Officer Charles L. Smith was patrolling Desert Hot Springs in a marked car with his partner, Officer John Quintero, when he observed a person, later identified as Flores, driving Ray's stolen Honda Accord while not wearing a seatbelt. When Officer Smith attempted to conduct a traffic stop, Flores sped away at a high rate of speed. Paez leaned out of the rear passenger seat window and fired at the officers with a handgun. Officer Quintero returned fire with his rifle. Other officers assisted and also fired weapons at the Honda. Eventually, the officers lost sight of the Honda. They later found it with a dead person, identified as Melendrez, in the front passenger seat with a gunshot wound to his head.

Paez and Flores entered a nearby house. After the occupant of the home escaped, the police secured its perimeter. When the defendants refused to surrender, the police fired tear gas into the home. The men eventually came out and were arrested.

After the trial court denied Flores's motion to sever the charges, the codefendants were jointly tried. Ryan Monis, a senior investigator with the Riverside County District

Attorney's Office, testified as an expert on criminal street gangs. Monis was very familiar with the West Drive Locos or West Drive (WDL) and its status as a criminal street gang. Monis testified regarding the difference between a gang member and an associate. He concluded that Paez and Melendrez were WDL gang members and that Flores was an active gang associate.

In connection with the shooting on May 23, the jury found Paez guilty of one count each of attempted murder (count 12), firing at an occupied car (count 16), being a felon in possession of a firearm (count 18) and street terrorism (count 17), and two counts of assault with a firearm (counts 14, 15). It also found true firearm enhancements connected to counts 12, 14, 15, 16.

In connection with the shooting on May 30, the jury found Paez guilty of first degree murder and Flores guilty of second degree murder. It found Paez guilty of two counts each of attempted murder (counts 2, 3) and assault with a firearm (counts 4, 5), but Flores not guilty of these charges. It found Paez guilty of street terrorism (count 10), being a felon in possession of a firearm (count 11), and firing at an occupied car (count 6). It found Flores guilty of receiving stolen property (count 9) and eluding a police officer (count 19), but not guilty of firing at an occupied car (count 6). Finally, the jury found Paez not guilty of vehicle theft (count 8) and found true various firearm and gang enhancements related to certain counts.

The court sentenced Paez to a total determinate term of 87 years and a consecutive indeterminate term of 70 years to life. Flores received a total term of 17 years to life in prison. Both defendants timely appealed.

DISCUSSION

I. *Flores's Appeal*

A. Motion to Sever

1. Facts

The prosecution charged defendants with multiple counts related to the May 30 shooting and Paez with multiple counts arising from the May 23 shooting. Flores moved to sever his trial from Paez's trial arguing that the jury could: (1) convict him solely based on his association with Paez; (2) speculate that he was the unidentified driver on May 23; and (3) become confused based on the multiple counts. After hearing the arguments of counsel, the trial court denied the motion concluding that the evidence as to Flores's participation in the May 30 shooting was strong, there was no evidence that Flores was involved in the May 23 shooting, and Flores's association with a more "active" defendant occurs in most multiple defendant cases.

2. Analysis

Flores asserts the trial court abused its discretion in denying his pretrial motion to sever because implications from the May 23 incident undermined his defense to the May 30 charges that he was a 14-year-old kid driving a car when the police gave chase and he sped away in panic as Paez fired at the officers. He claims that *People v. Chambers* (1964) 231 Cal.App.2d 23 (*Chambers*) demonstrates the trial court's error and contends that the erroneous denial of his motion prejudiced him and warrants reversal of his convictions. As we explain, Flores's contentions are without merit.

There is a statutory preference for the joint trial of jointly charged defendants. (§ 1098.) Thus, joinder is the rule and severance the exception. (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.) A defendant seeking severance has the burden to establish a substantial danger of prejudice requiring that the charges be separately tried. (*People v. Catlin* (2001) 26 Cal.4th 81, 110.) We review a trial court's denial of a motion for severance for abuse of discretion based on the record when the motion was heard. (*People v. Coffman* (2004) 34 Cal.4th 1, 41.) Refusal to sever may be an abuse of discretion where: (1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are likely to inflame the jury against the defendant; and (3) a weak case has been joined with a strong case so that the " 'spillover' " effect of aggregate evidence on several charges might alter the outcome of some or all of the charges. (*People v. Catlin*, *supra*, at p. 110.) "Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*People v. Coffman*, *supra*, at p. 41.)

Here, although it is possible the jury could infer that Flores was the unidentified driver on May 23, there was absolutely no evidence presented connecting him to the May 23 shooting, he was not charged with any crimes that occurred on that day and the trial court instructed the jury that evidence admitted only against a certain defendant cannot be considered against any other defendant. Generally, a proper jury instruction obviates any need for severance (see, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 461),

and we presume that jurors will obey a limiting instruction. (*People v. Coffman*, *supra*, 34 Cal.4th at pp. 43-44.)

Flores relies on *Chambers* to contend the jury could have found him guilty simply because of his association with Paez. *Chambers* involved two defendants, an owner of a rest home and a supervising nurse who were convicted of separate incidents of assaulting a patient. (*Chambers*, *supra*, 231 Cal.App.2d at pp. 24-26.) There was extensive evidence showing the nurse committed violent assaults, but no evidence of joint or conspiratorial action, and the owner was not connected to the nurse's alleged conduct. (*Id*. at p. 26.) In addressing a joinder challenge, the *Chambers* court concluded that the trial court committed reversible error in joining the defendants' cases because: (1) the defendants were tried for separate and unrelated offenses; (2) there was voluminous evidence the nurse committed acts of brutality unrelated to the owner's charges; (3) there was highly inflammatory character evidence as to the nurse; (4) the evidence against the owner was thin in relation to the evidence of brutality committed by the nurse; (5) a jury instruction directing the jury to disregard evidence adduced against one defendant alone was inadequate; and (6) the prosecution emphasized the moral partnership between the defendants and suggested the defendants slept together. (*Id*. at pp. 27-28.) The *Chambers* court concluded that, because much of the prejudicial evidence would not have been permissible had the owner been tried alone, joinder of the defendants' trials constituted prejudicial error leading to guilt by association. (*Chambers*, *supra*, at p. 34.)

The instant case, however, does not involve such unusual and egregious circumstances and is not analogous to *Chambers*. Although joinder of the trials resulted

in the admission of evidence regarding the May 23 shooting committed by Paez, the fact evidence is admissible as to one defendant and inadmissible as to the other does not necessarily preclude a joint trial. As the *Chambers* court noted, "California decisions do not regard this circumstance as an ineluctable demand for separate trials." (*Chambers, supra*, 231 Cal.App.2d at p. 33.) Moreover, the May 23 evidence was not so prejudicial that severing defendants' trials was required. The trial court reasonably concluded that the evidence as a whole was cross-admissible and that any "spillover" effect from trying charges against Paez was negligible as to Flores.

Accordingly, we reject the contention that the trial court abused its discretion by denying severance. For the same reasons, we reject Flores's contention the joint trial actually resulted in a due process violation.

B. Failure to Bifurcate Gang Enhancements

1. Facts

The trial court denied Flores's in limine motion to bifurcate the gang enhancement allegations connected to certain counts. Thereafter, it held an Evidence Code section 402 hearing to determine whether Monis, the prosecution gang expert, should be allowed to testify regarding the defendants' gang affiliation. After hearing from Monis, the trial court concluded that Monis could testify regarding the gang allegations. Flores reiterated his request to bifurcate prior to Monis's trial testimony, but the court again denied the motion.

2. Analysis

Flores contends the trial court's denial of his motion to bifurcate trial of the gang enhancements from the substantive trial was an abuse of discretion. He argues the trial court committed prejudicial error when it refused bifurcation because the prosecution improperly used the gang evidence to establish intent and motive. He also asserts the evidence was particularly inflammatory because it allowed the prosecution to admit evidence of Paez's strong gang ties.

Evidence of a "defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*).) However, a "criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) It is also well established that gang evidence is admissible when the very reason for the crime is gang related. (*People v. Champion* (1995) 9 Cal.4th 879, 922, overruled on another point in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.) Thus, gang evidence is admissible in the prosecutor's case-in-chief, regardless of whether there is a criminal street gang enhancement allegation, where it is relevant to establish motive, intent or some fact other than the defendant's criminal propensity, provided that the probative value of the evidence is not substantially outweighed by its prejudicial effect. (*Williams*, *supra*, at p. 193; see generally, Evid. Code § 352.) Accordingly, "[t]o the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any

inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Hernandez*, *supra*, at pp. 1049-1050.) A trial court has broad discretion in deciding whether to bifurcate issues in a criminal trial and the defendant has the burden of showing that there is a substantial danger of undue prejudice from the evidence. (*Id*. at pp. 1048, 1050-1051.)

Here, the trial court reasonably concluded bifurcation was unnecessary, because Flores's gang affiliation was admissible in the trial of the substantive offenses to prove his motive and intent. Evidence that Paez and Melendrez were WDL gang members, that Flores was an associate of WDL, that one of the primary activities of the WDL gang included shootings, that gang members generally commit crimes with people they trust, such as other gang members or associates, that active gang members often use prospective gang members that are juveniles to commit crimes, and that active or prospective gang members "put[] in work" or do acts to benefit the gang and establish the gang's reputation had a "tendency in reason" (Evid. Code, § 210) to prove motive for shooting at CHP officers to avoid a routine traffic stop. This evidence was also relevant to proving Flores's intent. The prosecution's theory of the case was that Flores accompanied Paez and Melendrez to "put[] in work" for the gang and that he intended to enhance his reputation and the reputation of WDL by aiding and abetting a shootout with the police.

Flores did not establish that any of the gang evidence was so "extraordinarily prejudicial" that it threatened to sway the jury to convict regardless of actual guilt

(*Hernandez, supra,* 33 Cal.4th at p. 1049), and we discern no abuse of discretion in the trial court's decision (*id*. at pp. 1050-1051).

C. Sufficiency of the Evidence

1. Legal Principles

When a defendant challenges the sufficiency of the evidence to support his conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We may not reweigh the evidence, reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 884.) Additionally, we may reject the testimony of a witness who was apparently believed by the trier of fact only if that testimony is inherently improbable or impossible of belief. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," we will affirm. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

The same standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft*, *supra*, at p. 1053.)

2. Provocative Act Murder

Flores asserts that the evidence is insufficient to support his conviction for the second degree provocative act murder of Melendrez. On this issue, we requested further briefing from the parties on whether Flores drove or operated the car in such a manner as to constitute a provocative act by him. As we shall explain, the evidence is sufficient to uphold Flores's provocative act murder conviction on the theory that he committed a provocative act.

The provocative act theory of murder applies in situations where the defendant neither kills nor intends to kill, but causes a third party to kill in response to the defendant's life threatening provocative acts. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 57.) The malice necessary for provocative act murder is implied from the defendant's act which is sufficiently provocative of a lethal response. (*People v. Cervantes* (2001) 26 Cal.4th 860, 867.) To prove provocative act murder, the prosecution must establish that the defendant committed an act that provoked a third party to fire a fatal shot (the actus reus element) knowing "that his or her provocative act ha[d] a high probability—not merely a foreseeable possibility—of eliciting a life-threatening response from the person who actually fire[d] the fatal bullet" (the mens rea element). (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 582.) These two elements are often discussed in terms of whether the provocative act committed by the defendant proximately caused the killing. (*Ibid.*)

The typical fact pattern for application of the provocative act murder doctrine is a gun battle in which a victim, police officer, or other third party shoots and kills another person in response to the defendant's provocative act. (*People v. Cervantes, supra,* 26 Cal.4th at p. 867.) However, the provocative act doctrine is not limited to deaths caused by gunfire; rather, "it applies to *any conduct* that is ' "fraught with grave and inherent danger to human life" ' so as to show a conscious disregard for human life." (*People v. Lima* (2004) 118 Cal.App.4th 259, 266 (*Lima*).) For example, in *Lima*, the court found that the defendant's "attempt to escape the scene of a robbery by engaging in a high-speed, dangerous chase was an intentional act committed with a conscious disregard for life" and constituted a provocative act. (*Id*. at p. 268.)

Here, the trial court instructed the jury that Flores could be liable for Melendrez's death on the theory of a provocative act murder by an accomplice if he, while aiding and abetting Paez's crimes for attempted murder or assault with a firearm or intentional discharge of a firearm into an occupied vehicle, intentionally did a provocative act. (CALCRIM No. 561.) A provocative act was defined as an act "[t]hat [went] beyond what is necessary to accomplish the Felony Evading" and "[w]hose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response." (*Ibid*.)

The jury found Flores guilty of felony evading in violation of Vehicle Code section 2800.2, meaning that Flores fled from or attempted to elude a pursuing peace officer and drove in a manner showing "a willful or wanton disregard for the safety of persons *or* property." (Veh. Code, § 2800.2, subd. (a), italics added.) Notably, the

statute is written in the disjunctive, suggesting that a defendant can violate Vehicle Code section 2800.2 if a vehicle is driven in willful and wanton disregard for the safety of only property. Additionally, willful and wanton disregard of the "safety of persons" does not necessarily endanger the lives of persons. (*Ibid*.) Thus, our high court has concluded that a violation of Vehicle Code section 2800.2 "is not, in the abstract, inherently dangerous to human life." (*People v. Howard* (2005) 34 Cal.4th 1129, 1138-1139.)

Accordingly, for us to uphold Flores's conviction for provocative act murder under the theory that he committed a provocative act that resulted in Melendrez's death, the record must contain evidence showing that Flores drove in a manner that went beyond that necessary to accomplish the crime of felony evading, i.e., that he did something *more* than driving with willful or wanton disregard for the safety of persons or property while willfully fleeing from or trying to elude an officer. The record contains such evidence.

When the chase started, Flores drove at speeds up to 70 to 80 miles per hour and through two red lights during "heavy" Friday night traffic. When traffic in front of Flores stacked up, he crossed a center median and continued southbound in a northbound lane. He then cut through a gas station parking lot where high school kids were holding a carwash fund raiser causing a few couples to push their kids out of the way. As Flores exited the parking lot, he drove into oncoming traffic until he again crossed the center median. After Paez fired his weapon, Flores drove through intersections and stop signs without stopping. Flores then crashed through a chain link fence bordering a mobile home park as the officers continued their pursuit. This initial chase covered about 11 miles.

Flores later swerved to avoid a spike strip and then drove through an intersection at about 90-100 miles per hour. One waiting officer testified that he specifically aimed his rifle at the driver because the car was headed into a populated area placing "more people's lives at risk." Flores ultimately crashed the car in a residential backyard. During the chase, Flores drove past officers stationed to attempt to end the chase, that could reasonably be expected to shoot and that did shoot at the car.

While Flores's reckless driving certainly revealed a willful and wanton disregard for the safety of persons or property, it also amounted to conduct that Flores should have known was dangerous to human life and displayed a conscious disregard for life so as to constitute a provocative act. As one court noted, "a driver can flee or otherwise attempt to elude pursuing officers in a manner that does not pose a high probability of death to anyone." (*People v. Sanchez* (2001) 86 Cal.App.4th 970, 978.) Here, Flores's high-speed and dangerous driving exhibited conscious disregard for life in general, prompting at least one officer to target him with his rifle before Flores drove into a populated area. Under these facts, a reasonable jury could conclude that Flores's driving constituted a provocative act.

3. Gang Enhancement

Flores contends the true finding on the gang enhancement attached to the count for provocative murder must be reversed because the evidence did not establish that he committed a provocative act murder in association with WDL or that he had the specific intent to promote, further or assist criminal conduct by gang members. (§ 186.22, subd. (b).) We disagree.

To establish a gang enhancement, the prosecution must prove two elements: (1) that the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) that the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." (§ 186.22, subd. (b)(1).) "Not every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).) The gang-related requirement may be shown by evidence indicating that several defendants "came together as gang members" to commit the offense, or that the offense could benefit the gang by, for example, elevating the gang's or gang members' status or advancing the gang's activities. (*Id*. at pp. 62-63, italics omitted; see *People v. Gardeley* (1996) 14 Cal.4th 605, 619.)

We reject Flores's argument that the evidence failed to establish his crime was committed in association with, for the benefit of, or at the direction of a criminal street gang. First, these requirements are stated in the disjunctive. (§ 186.22, subd. (b)(1).) For example, if the evidence is sufficient to establish that the crime was committed in association with a gang, the prosecution need not prove that it was committed for the benefit of or at the direction of a gang. Here, there was substantial evidence to sustain the jury's finding that his crime was committed "in association with" a criminal street gang within the meaning of section 186.22. Specifically, Flores was a WDL associate, driving two WDL gang members when he engaged in a dangerous and high-speed chase that resulted in Melendrez's death. Additionally, when given hypothetical facts matching the facts of the May 30 incident, Monis opined that the crimes were gang related because they were committed by two gang members, a gang associate, within gang territory,

where the individuals were actively assisting each other to avoid being caught by the CHP. Because substantial evidence supports a finding that Flores's crime was committed in association with a gang, reversal cannot be justified by the possibility that the evidence might have been reconciled with a finding that he acted for personal reasons only. (*Albillar*, *supra*, 51 Cal.4th at p. 60.)

The evidence also established the second element of the enhancement—that Flores's actions that resulted in his provocative act murder conviction were done "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) This element does not "require[] that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*Albillar*, *supra*, 51 Cal.4th at p. 67.) This element "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Id*. at p. 66.)

The jury reasonably could conclude that through his dangerous driving Flores specifically intended to promote, further or assist criminal conduct by a gang member, namely Flores himself. Monis explained that prospective gang members need to put in work for the gang to increase their status within the gang. Alternatively, the jury could conclude that Flores's driving assisted Paez, a WDL gang member, to escape from the CHP or attempt to murder law enforcement officers. Notably, the jury heard testimony that two of the primary activities of the WDL gang included murder and shootings. The jury also saw a photograph of graffiti on a park wall within WDL gang territory stating

"187 DHS PD." Monis testified that "187" is the Penal Code section for murder and the jury could reasonably infer that "DHS PD" stood for Desert Hot Springs Police Department.

Accordingly, we reject Flores's contention that the evidence was insufficient to support the gang enhancement allegation.

4. Receiving Stolen Property

"To sustain a conviction for receiving stolen property, the prosecution must prove: (1) the property was stolen; (2) the defendant knew the property was stolen (hereafter the knowledge element); and[] (3) the defendant had possession of the stolen property. [Citations.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.) Flores asserts that the evidence was insufficient as a matter of law to support the knowledge element required for receiving a stolen car. We disagree.

"Possession of the stolen property may be actual or constructive and need not be exclusive." (*People v. Land* (1994) 30 Cal.App.4th 220, 223 (*Land*), fn. omitted.) "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (*People v. McFarland* (1962) 58 Cal.2d 748, 754 (*McFarland*).) This principle of law is incorporated into an instruction given to the jury. (CALCRIM No. 376.)

As the driver of the stolen car, Flores was undoubtedly in possession of the car. (*Land, supra,* 30 Cal.App.4th at p. 223, fn. 2.) Because Flores was found in the Honda the day after it was stolen, all that was necessary to support a finding that he was aware

the car was stolen was "slight corroboration" of guilty knowledge from his conduct or the circumstances at the time. (*McFarland*, *supra*, 58 Cal.2d at p. 754.) Here, Flores fled at high speed immediately after the CHP officers activated their lights and siren, suggesting a consciousness of guilt.

While Flores points out he had multiple possible reasons for fleeing from the police, the fact there may have been alternative explanations for his flight does not compel rejection of the inference that his flight was motivated by consciousness of guilt for being in possession of a stolen car. Alternative explanations for flight simply go to the weight of the evidence. (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.) Flores also relies on the holdings in *In re Anthony J.* (2004) 117 Cal.App.4th 718, and *Land*, *supra*, 30 Cal.App.4th 220. However, these cases are inapposite as they addressed the unique question of when a passenger seated inside a stolen car can be found to have possession or dominion and control over the stolen car itself. (*In re Anthony J.*, *supra*, at pp. 728-729; *Land*, *supra*, at pp. 223-228.)

Based on Flores's possession of the car and the suspicious circumstances, it reasonably could be inferred that he knew the car had been stolen. Therefore, viewing the evidence in the light most favorable to the judgment, the jury reasonably could have concluded that Flores was in possession of stolen property. Our opinion that the circumstances of the crime might also be reasonably reconciled with a contrary finding is insufficient to warrant a reversal of the judgment. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053-1054.)

II. *Paez's Appeal*

A. Alleged Instructional Error for Attempted Murder (Counts 2, 3, 12)

The trial court instructed the jury with CALCRIM No. 600, the standard attempted murder jury instruction. The instruction told the jurors that to find a defendant guilty of attempted murder, the People must prove that: "1. The defendant took at least one direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. *A direct step indicates a definite and unambiguous intent to kill.* It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (CALCRIM No. 600, italics added.)

Paez asserts that his attempted murder convictions must be reversed because the italicized statement in the instruction erroneously told the jury that proof of a direct step establishes an intent to kill. Although Paez acknowledges that in *People v. Lawrence* (2009) 177 Cal.App.4th 547 (*Lawrence*), the Court of Appeal considered and rejected a similar claim, he asserts that *Lawrence* was incorrectly decided. The People assert that *Lawrence* was correctly decided and there was no reasonable likelihood jurors would be confused based on the entire charge to the jury. Even assuming the instruction is

improper, the People claim the error was harmless under any standard because Paez clearly harbored an intent to kill.

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) CALCRIM No. 600 correctly states the law of attempted murder as it requires that the People prove a defendant took at least one direct but ineffective step toward killing another person and that the defendant intended to kill that person. As the *Lawrence* court explained, "[t]he instruction as a whole makes it clear that in order to find an attempt, the jury must find two distinct elements: an act and an intent. These elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.] Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused's conduct constituted the requisite direct step or merely insufficient planning or preparation." (*Lawrence*, *supra*, 177 Cal.App.4th at p. 557.)

Moreover, the trial court instructed with CALCRIM No. 225 requiring the jurors find that the defendant committed the acts with which he was charged and did so with the requisite intent to kill. They were also instructed with a version of CALCRIM No. 252 that there must be a union of act and intent. That instruction stated: "For you to find a person guilty of these crimes that person must not only commit the prohibited act . . . , but must do so with wrongful intent." Finally, the prosecutor's closing argument to the jury emphasized that attempted murder required that "the defendant took at least one direct but ineffective step, and intended to kill that person." Based on the foregoing, there is no likelihood that the jury was confused by the given instructions.

B. Alleged Section 654 Violation

In counts 10 and 17 the jury convicted Paez of the offense of street terrorism in violation of section 186.22, subdivision (a) based on the crimes he committed on May 23 and 30. In sentencing Paez, the trial court ordered that the two-year sentences it imposed for the street terrorism offenses run concurrently with his other convictions.

Section 654 provides that "[a]n act . . . that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Where a defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be

punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Ibid*.) A defendant's intent and objective are factual questions for the trial court (*People v. Coleman* (1989) 48 Cal.3d 112, 162) and its determination will be upheld if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Relying on *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), Paez asserts that his sentences for street terrorism should have been stayed under section 654 because the underlying felonies relied on for those counts were the same offenses alleged in his other convictions. (*Id.* at pp. 1309-1316.) The Attorney General, however, relies on *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*) and its progeny which indicate that multiple punishment for gang participation and for the underlying offense is permissible as long as the underlying offense requires a different specific intent. (*Id*. at pp. 1466-1468.)

After this matter was fully briefed our Supreme Court decided *People v. Mesa* (June 4, 2012, S185688) ___ Cal.4th ___, 2012 Cal. LEXIS 5204, which considered how section 654 applies in the context of the crime of street terrorism. In summary, the high court followed *Sanchez* and disapproved *Herrera*. (*Mesa*, *supra*, at *11-12, *16.) We permitted supplemental briefing to address *Mesa*. The Attorney General now concedes that Paez's sentences for street terrorism should have been stayed under section 654. Accordingly, we direct the trial court to modify the judgment to stay Paez's sentences on counts 10 and 17 under section 654.

DISPOSITION

The matter is remanded to the trial court with directions to: (1) stay Paez's sentences for his convictions on counts 10 and 17 under section 654; (2) correct Paez's abstract of judgment and minute order to reflect that he was sentenced to life with the possibility of parole with a minimum parole eligibility date of seven years, plus 20 years for the firearm enhancement for his attempted murder conviction in count 12; and (3) forward a copy of the modified abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, Paez's judgment is affirmed. Flores's judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.